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THE USE OF ENDORSEMENT IN ESTABLISHMENT CLAUSE ANALYSIS— THE KEY TO A NEW CONSENSUS

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INTRODUCTION

From the outset of its efforts to articulate and apply establishment clause principles, the Supreme Court[1] has found the task to be problematic.[2] Despite the initial promise of the Court's three-part establishment clause analysis known as the Lemon Test,[3] the analysis has provided no greater degree of predictability than the cases preceding it, has resulted in numerous five to four[4] and plurality opinions,[5] and has drawn sharp attacks since the day it was enunciated.[6] The criticisms, both from within the Court[7] and

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1. The United States Supreme Court is hereinafter referred to as "the Court."

2. Everson v. Board of Education, 330 U.S. 1 (1947) (5-4 decision) (*Everson* represents the first attempt by the Supreme Court to interpret the establishment clause.).

3. The Lemon Test was first articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971).

4. *E.g.*, Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids v. Ball, 105 S. Ct. 3216 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Mueller v. Allen, 463 U.S. 388 (1983); Committee for Public Education v. Regan, 444 U.S. 646 (1980).

5. *E.g.*, Roemer v. Board of Public Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672 (1971). *Cf.* Wolman v. Walter, 433 U.S. 229 (1977) (involving 6 different aid programs, resulting in 5 different voting patterns by the Justices).

6. *See* Giannella, *Lemon and Tilton: The Bitter and Sweet of Church-State Relations*, 1971 SUP. CT. REV. 147, 148.

7. *E.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (Rehnquist, J., dissenting) (arguing that *Lemon* is based on an historically faulty doctrine which has made principled results difficult. *Id.* at 91); Committee for Public Education v. Regan, 444 U.S. 646 (1980) (recognizing that the Lemon Test sacrifices clarity and predictability for flexibility. *Id.* at 662.); Wolman v. Walter, 433 U.S. 229, 264 (1977) (Stevens, J., concurring and dissenting) (calling for an abandonment of the Lemon Test and a return to the "no aid" Everson Test. *Id.* at 266.); Roemer v. Board of Public Works, 426 U.S. 736, 767 (1976) (White, J., concurring) (referring to the Lemon Test as "unnecessary [and] . . . superfluous tests." *Id.*).

among legal scholars,[8] have mounted with each additional establishment clause decision leading critics to charge that the opinions are lacking in principled bases.[9]

With growing dissatisfaction in both the application and results of the *Lemon* analysis, the Supreme Court appeared on the verge of abandoning the test in the early part of this decade, first by ignoring it in a case involving legislative chaplains,[10] and then by giving it only cursory application in the controversial creché case.[11] Despite these signals, the Supreme Court emphatically reaffirmed the Lemon Test in four cases decided during the 1984 term.[12]

Although this re-affirmation at first appeared as nothing more than the Court's clinging to the only establishment clause analysis ever to command a majority on the Court,[13] these four 1984 establishment clause opinions contain the framework for achieving clarity and understanding of the Court's efforts to protect establishment clause values. The key element in the framework lies in Justice O'Connor's endorsement approach to the Lemon Test.[14] This approach, when merged with Justice Brennan's long-standing judicial philosophy on the establishment clause,[15] provides the basis for forging a new consensus on the Court for resolving establishment clause issues.[16]

The purpose of this article is to complete the emerging theory of endorsement as an analytical framework for resolving, on a

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8. *E.g.*, Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615, 615 (1981) (doctrinal basis of the Burger Court's decisions seems convoluted); Giannella, *supra* note 6, at 199, (establishment clause opinions lack "cogency and rationality"); Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 10 (1984) (characterizing the cases as a "hodge-podge of decisions [which] sounds like it derived from Alice's Adventures in Wonderland"); Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U.L. REV. 707, 718 (1984)(Court's manipulation of its standard illustrates weakness of Lemon Test); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1473 (1981) (Court's decisions are characterized by "contradictory assertions, confusing signals, and unsupportable theses").

9. *E.g.*, Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); *see also*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980)("application of the Court's three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis").

10. Marsh v. Chambers, 463 U.S. 783 (1983).

11. Lynch v. Donnelly, 465 U.S. 668 (1984).

12. Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids v. Ball, 105 S. Ct. 3216 (1985); Thornton v. Caldor, 105 S. Ct. 2914 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985).

13. Wallace v. Jaffree, 472 U.S. 38, 62 (1985) (Powell, J., concurring).

14. Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

15. Abington v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring).

16. Justice Brennan's reliance on Justice O'Connor's endorsement language in his most recent establishment clause decision demonstrates the compatibility of his philosophy with the endorsement approach. *See* Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Grand Rapids v. Ball, 105 S. Ct. 3216, 3226 (1985).

principled basis, all establishment clause issues and to show its compatibility with core first amendment values. To accomplish this objective, the article examines the origins and development of the present Lemon Test in order to clarify the current status of each element of the test. The Court's own characterizations and criticisms of the test are then reviewed, illustrating the role that internal disagreement has played in weakening the *Lemon* analysis. Since the parochial aid cases have drawn the most severe criticism in establishment clause jurisprudence, the article surveys these opinions and reveals the difficulty the Court has had in applying the *Lemon* analysis on this issue.[17] Justice O'Connor's

17. In Everson v. Board of Education, Justice Rutledge's dissent predicted that the majority of establishment clause cases would come from efforts to channel tax dollars to religiously affiliated schools and attempts to include religious exercises in the public schools. 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting). In recent years, several doctrinally significant cases have arisen in other contexts. *E.g.*, Thornton v. Caldor, 472 U.S. 703 (1985) (state law preventing dismissal of employees who refuse to work on their designated Sabbath); Lynch v. Donnelly, 465 U.S. 668 (1984) (city sponsored creché or nativity scene); Marsh v. Chambers, 463 U.S. 783 (1983) (paid legislative chaplain); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (church veto over granting of liquor licenses); Larson v. Valente, 456 U.S. 229 (1982) (registration and reporting requirements upon religious organizations soliciting more than fifty percent of their funds from non-members), Walz v. Tax Commission, 397 U.S. 664 (1970) (property tax exemptions for churches); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday Closing Laws). The Court has also rendered its most inconsistent results in the parochial aid cases, despite the fact that the Lemon Test was first applied in such a case. Lemon v. Kurtzman, 403 U.S. 602 (1971).

> For example, a state may lend to parochial school children geography textbooks that contain maps of the United States, but the state may not lend maps of the United States for use in geography class. A state may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a projector to show it in history class. A state may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable. A state may pay for bus transportation to religious schools but not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A state may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing 'services' conducted by the state inside the sectarian school are forbidden [citation omitted], but the state may conduct speech and hearing diagnostic testing inside the sectarian school [citation omitted]. Exceptional parochial school students may receive counselling, but it must take place outside the parochial school, such as in a trailer parked down the street [citation omitted]. A state may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects.

Wallace v. Jaffree, 472 U.S. 38, 91 (Rehnquist, J., dissenting).

endorsement theory,[18] as modified by Justice Brennan,[19] is then introduced and critiqued to determine its suitability and adequacy for dealing with establishment clause issues. The article then expands Justice O'Connor's endorsement approach into a complete analytical structure, drawing from Justice Brennan's original establishment clause test first announced in his famous *Schempp* concurrence.[20] The article concludes with an examination of core first amendment principles to determine if these concerns are adequately safeguarded by the Complete Endorsement Analysis, and then explores its suitability for resolving various perplexing establishment clause issues.

DEVELOPMENT AND CURRENT STATUS OF THE LEMON TEST

The Supreme Court announced its tripartite establishment clause test which it has relied on for sixteen years[21] in *Lemon v. Kurtzman*,[22] twenty-four years after the Court began interpreting the establishment clause.[23] The Lemon Test requires that government action have a secular legislative purpose, that it have a primary effect that neither advances nor inhibits religion, and that the action not foster excessive government entanglement with religion.[24] The Court drew the first two elements of the test from *Abington v. Schempp*,[25] while taking the third prong of the test from *Walz v. Tax Commission*,[26] a case which upheld the constitutionality of a state property tax exemption for religious properties used solely for religious worship. In *Lemon*, the Court included the issue of political divisiveness, an establishment clause concern

18. Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

19. Grand Rapids v. Ball, 105 S. Ct. 3216, 3230 (1985).

20. Abington v. Schempp, 374 U.S. 203, 294-95 (Brennan, J., concurring).

21. The only establishment clause case in which the Court completely ignored the Lemon Test was Marsh v. Chambers, 463 U.S. 783 (1983), involving the constitutionality of paid legislative chaplains. In Larson v. Valente, 456 U.S. 228 (1982), the Court applied strict scrutiny to a state statute granting denominational preference, but then applied the Lemon Test as well. *See* Lynch v. Donnelly, 465 U.S. 668, 696 n.2 (1984) (Brennan, J., dissenting).

22. 403 U.S. 602 (1971).

23. Everson v. Board of Education, 330 U.S. 1 (1947).

24. 403 U.S. 602, 612-13 (1971).

25. 374 U.S. 203, 222 (1963). This case credited two earlier establishment clause cases with the genesis of the "purpose and effect" test: Everson v. Board of Education, 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420 (1961).

26. 397 U.S. 664, 670, 674 (1970).

recognized as early as *McCollum v. Board of Education*,[27] as part of the entanglement inquiry.[28]

Because *Lemon* gave little guidance as to the application of the three-part test, the analytical development of each inquiry has come from the Court's subsequent use of the test. Although the cases have been marked by inconsistency,[29] a close examination of the decisions reveals some broad generalizations about the elements of the Lemon Test which prove helpful in developing the Complete Endorsement Analysis.

Lemon and its progeny treat the requirement that government action have a secular legislative purpose as an inquiry easily satisfied, with only three cases invalidating government action on this basis.[30] The first of these involved a Kentucky statute requiring the posting of the Ten Commandments on the wall of every public school classroom.[31] In a per curiam opinion, the Court held that the legislation had a "pre-eminent purpose" of promoting religion, despite an "avowed" secular purpose.[32] The opinion, however, failed to explain when an examination beyond the stated legislative purpose is justified or how it is quantified. In sharp dissent, Justice Rehnquist pointed out the unprecedented nature of the Court's rejection of a secular purpose which had been recognized by both the legislature and the highest court of a state.[33]

In *Wallace v. Jaffree*,[34] the second case to declare a state statute unconstitutional for want of a valid secular purpose, the Court struck down Alabama's "moment of silence" legislation which expressly permitted prayer in the public schools. The Court held that while government action partially motivated by religious considerations may satisfy the secular purpose prong of the Lemon Test, one entirely motivated by religious matters will not.[35] The appropriate question to ask, according to the majority opinion,

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27. 333 U.S. 203, 217 (1948).

28. 403 U.S. 602, 622-23 (1971).

29. *See supra*, text accompanying notes 3-9.

30. Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980). But note that no program involving state aid to church related schools has been found constitutionally infirm for want of a valid secular purpose.

31. Stone v. Graham, 449 U.S. 39 (1980).

32. *Id.* at 41.

33. *Id.* at 43. *See also* Mueller v. Allen, 463 U.S. 388, 394-95 (1983) (Justice Rehnquist, writing for a majority of the Court, reiterated the point he made in his *Stone* dissent by saying that the secular purpose inquiry is ordinarily easily satisfied, because of the Court's reluctance to attribute unconstitutional motives to a state if the secular purpose is "plausible" and easily discernible from the face of the statute).

34. 472 U.S. 38 (1985).

35. *Id.* at 56.

is whether government intends to endorse or disapprove religion.[36]

The final case, *Edwards v. Aguillard,*[37] considered the constitutionality of a Louisiana statute providing for balanced teaching of creation-science and evolution-science in the public schools. Finding the legislative purpose to be similar to the one struck down in *Stone v. Graham,*[38] the Court held that the pre-eminent purpose of the statute was to advance the religious belief of divine creation of humanity.[39]

From these three cases, a presumption emerges that legislation has a valid secular purpose. The Court's rather sparse treatment indicates that this presumption may be overcome only when the overriding purpose is religious, or one entirely motivated by religion.

Regarding the "primary effect" prong, the Court has most often relied on this part of the Lemon Test to strike down government actions which run afoul of the establishment clause. Unfortunately, the Court has failed to present easily discernible guidelines for discovering the primary effects of advancing religion.[40] Analysis of the relevant cases indicates that the Court's major concern in the "primary effects" analysis is whether the aid directly or substantially advances religion, or whether the promotion of religion is indirect and incidental.[41] A direct advancement has the primary effect of advancing religion, while indirect and incidental advancement passes this part of the *Lemon* analysis.

The Court has found direct and substantial advancement of religion in each of three classes of cases: 1) when government

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36. *Id.* at 60-61. *But see, Id.* at 107-09 (Rehnquist, J., dissenting) (arguing that the secular purpose inquiry has never been fully defined, and that this decision has made the constitutional inquiry turn upon "what legislators put in the legislative history and, more importantly, what they leave out." *Id.*). *See also* Levinson, *supra* n.8 at 724-25 (arguing that the secular purpose requirement has forced the Court to ignore reality in order to satisfy it, and also creates tension with the free exercise clause, which sometimes requires exceptions to accommodate religious practices).

37. 107 S. Ct. 2563 (1987).

38. 449 U.S. 39 (1980).

39. 107 S. Ct. 2563, 2581 (1987).

40. *See* Levinson, *supra* n.8 at 725-26 (pointing out that application of the effects prong has proven problematical, since the Court has failed to clarify how much of a sectarian effect invalidates a government action or program).

41. Grand Rapids v. Ball, 105 S. Ct. 3216, 3228 (1985).

aids a church-related institution permeated with religion;[42] 2) when government funds a specific religious activity in a substantially secular setting;[43] and 3) when government confers special benefits on religious institutions.[44]

Conversely, the Court has made it clear that not all incidental aid to religiously affiliated institutions violates the establishment clause.[45] If a religious institution is not pervasively religious, government may fund the secular functions of the institution provided these functions are clearly identifiable and are separable from the religious activities.[46] Only neutral, nonideological aid that assists the secular aspects of an institution will withstand a constitutional challenge. Moreover, this neutral aid may have no more than an incidental effect of advancing religion.[47]

Although the Court's application of the "primary effect" prong is best understood when cast in terms of prohibiting direct and substantial advancements of religion, as opposed to an injunction against direct aid to church-related institutions, the two concepts closely parallel. At the elementary and secondary parochial school levels, the Court has, with only one exception, struck down direct

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42. Meek v. Pittenger, 421 U.S. 349, 365-66 (1975); Tilton v. Richardson, 403 U.S. 672, 680 (1971). The Court has classified an institution as one permeated with religion or pervasively religious when a substantial portion of its activities are subsumed with a religious mission. *See* Hunt v. McNair, 413 U.S. 734, 743 (1973). If the institution is permeated with religion, then there can be no government aid, because of the impossibility of separating secular activities from the religious ones. *See* Roemer v. Board of Public Works, 426 U.S. 736, 755 (1976). *But see*, Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in THE WALL BETWEEN CHURCH AND STATE 55, 64-65 (D. Oaks ed. 1963) (pointing out that those who oppose aid to religiously affiliated schools on the basis of permeation of secular subjects with religion must be prepared to accept as an outgrowth of this position that secular humanism is the only type of "educational orthodoxy" a State can fund).

43. Hunt v. McNair, 413 U.S. 734, 743 (1973).

44. Sloan v. Lemon, 413 U.S. 825, 832 (1973) (striking down Pennsylvania's "Parent Reimbursement Act for Non-public Education," where 90% of the children attending non-public schools were enrolled in religious schools).

45. Hunt v. McNair, 413 U.S. 734, 743 (1973) ("[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Id.*).

46. Levitt v. Committee for Public Education, 413 U.S. 472, 480 (1973) (holding unconstitutional a New York plan to reimburse schools for expenses incurred in administering, grading, compiling and reporting results of both teacher-prepared and state-prepared tests, as well as maintaining and reporting records required by the state. This was because the aid devoted to secular functions could not be identified and separated from aid to sectarian activities). *See also* Roemer v. Board of Public Works, 426 U.S. 736, 759-61 (1976). To determine if the aid was in fact extended to secular functions of a religious institution, the Court considers several factors: the aid cannot specifically support religious activities; there is a presumption that those charged with complying with the constitutional mandate will do so; and the Court will not anticipate possible unconstitutional use of the funds.

47. Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973) (New York's tuition reimbursement plan did not satisfy the primary effect prong because it failed to contain sufficient guarantees that the funds would be used exclusively for secular, neutral, nonideological purposes).

subsidies to religiously affiliated schools,[48] while upholding indirect subsidies in all but one case.[49] The Court, taking a different approach to higher education,[50] has drawn a distinction between pervasively and incidentally religious institutions. In the latter case, the Court allows direct aid if secular activities can be separated from religious ones[51] provided that religion is not singled out for special benefit.[52]

The final part of the *Lemon* analysis, the issue of excessive entanglement, divides along two concerns: administrative entanglement between government and the church; and political divisiveness. On administrative entanglement, the Court has given its clearest guidelines; on divisiveness, it has produced none.

Administrative entanglement between church and state, if characterized as excessive, is constitutionally impermissible.[53] The Court's concern is for the religious adherent as well as the non-adherent, both of whom suffer when government becomes "enmeshed" in matters of religious significance.[54] To determine if the administrative entanglement is excessive, the Court has relied on three factors: the character and purpose of the institution

48. Committee for Public Education v. Regan, 444 U.S. 646 (1980) (upholding a statute directing payment to non-public schools of costs incurred by them in complying with state-mandated requirements, including administering and grading of state-prepared tests, reporting, and record keeping).

49. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (striking down a state plan for tuition reimbursement and tax relief for parents of children attending non-public schools).

50. *See* Roemer v. Board of Public Works, 426 U.S. 736, 750 (1976). For purposes of determining both the primary effect of government action and the issue of excessive entanglement, the Court has noted several factors which distinguish higher education from pre-college education: "[c]ollege students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level." *Id. See also* Grand Rapids v. Ball, 105 S. Ct. 3216, 3223, n.6 (1985). The significance of these factors on the issue of permeation has led the Court, as a matter of law, to accept this distinction between elementary and secondary parochial education and religiously affiliated higher education.

51. Tilton v. Richardson, 403 U.S. 672, 680 (1971).

52. Sloan v. Lemon, 413 U.S. 825, 832 (1973).

53. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Walz v. Tax Commission, 397 U.S. 664, 674-75 (1970). *But see* Choper, *supra* note 9, at 681-83 (stating that avoidance of administrative entanglement is not a value to be secured by the establishment clause and should not be pursued at the expense of valid secular goals or the value of preserving religious freedom); Giannella, *supra* note 6, at 148 (arguing that entanglement raises more questions than it answers and is likely to become a "convenient label to help the Court announce decisions arrived at on other grounds more difficult to articulate in terms of consistent legal theory"); Levinson, *supra* note 8, at 726 (claiming that entanglement has generated confusion).

54. Aguilar v. Felton, 105 S. Ct. 3232, 3237 (1985). While the threat to the non-adherent may be obvious when government chooses to support religion, the danger to the benefited group may not be as clear at first glance. The Court's concern for the latter is rooted in the fear that loss of independence will result when government intrudes into sacred matters.

benefited;[55] the nature of the aid;[56] and the resulting relationship.[57]

The Court included political divisiveness, as an element of entanglement, in *Lemon v. Kurtzman*. Although it was alluded to in several earlier establishment clause cases,[58] the first full discussion of the political divisiveness came from Justice Harlan's concurring opinion in *Walz*.[59] Justice Harlan believed that the establishment clause was designed to prevent government involvement with religion because it leads to strife and friction in the political system. The Court in *Lemon* characterized political divisiveness as entanglement which is of a broader and different character than administrative entanglement.[60] The Court, however, offered no guidelines as to how political divisiveness would be determined. Instead, it assumed political divisiveness would occur over parochial aid in communities where a large percentage of children attended religious schools, thus forcing both candidates and voters to divide along religious lines.[61]

The Court immediately began to diminish the significance of political divisiveness in determining establishment clause violations.[62] In a companion case to *Lemon*, the Court found divisiveness along religious lines to be less of a factor at the college level than at the elementary and secondary levels of education.[63] Two years later, while referring to political divisiveness as a "warn-

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55. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971); *see also* Aguilar v. Felton, 105 S. Ct. 3232, 3238 (1985). The Court's distinction between pre-college and college education is significant in determining the issue of administrative entanglement as well as primary effect. Roemer v. Board of Works, 426 U.S. 736, 766 (1976). Of the three factors used to assess entanglement, the Court has indicated that the character and purpose of the institution benefited is the most significant factor and best explains the Court's holdings on entanglement.

56. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971). *See also* Tilton v. Richardson, 403 U.S. 672, 687-88 (1971) (pointing out that in examining the nature of the aid, the crucial factor is whether the aid can be characterized as nonideological).

57. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971). *See also* Aguilar v. Felton, 105 S. Ct. 3232, 3238-39 (1985) (pointing out that what the Court examines under this sub-inquiry is the scope and duration of the state's presence in the benefited institution to determine if detailed monitoring and close administrative contact are required to ensure compliance with the constitutional standards). *Cf.* Hunt v. McNair, 413 U.S. 734, 746-47, n.8 (1973) (the burden of proof as to the degree of church involvement rests upon the party challenging the aid).

58. Engel v. Vitale, 370 U.S. 422, 442 (1962); Zorach v. Clauson, 343 U.S. 306, 320 (1952); McCollum v. Board of Education, 333 U.S. 203, 217 (1948).

59. Walz v. Tax Commission, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

60. 403 U.S. 602, 622 (1971) (pointing out that while division and debate are normal and healthy in a democratic system, division over matters of religion is "one of the principal evils against which the First Amendment was intended to protect").

61. *Id. But see* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 518 (1968) (arguing that to deny benefits to religion which are available generally can result in invidious discrimination in favor of non-religion and lead to the type of political dissension which the establishment clause is designed to prevent).

62. *See* Curry, *supra* note 8, at 635 (pointing out that while the early Burger Court decisions recognized the importance of controlling religious factions, later cases have neglected this first amendment goal).

63. Tilton v. Richardson, 403 U.S. 672, 688-89 (1971).

ing signal not to be ignored," the Court sounded the death knell of divisiveness as a vital part of entanglement inquiry by conceding that division, standing alone, was probably inadequate for finding an establishment clause violation.[64] The Court dealt the divisiveness inquiry a further blow in *Mueller v. Allen*[65] by confining it to cases involving direct financial subsidies to parochial schools or their teachers. While the Court agrees that political divisiveness is a core establishment clause concern, it has found this query's place in the Lemon Test to be problematic.[66]

CHARACTERIZATIONS AND CRITICISMS OF THE LEMON TEST

The establishment clause cases decided prior to *Lemon v. Kurtzman* proved difficult for the Court to reconcile.[67] As a brief survey of the parochial aid cases indicates,[68] the Lemon Test failed to produce any greater clarity in establishment clause jurisprudence. This has resulted in part from the Court's own uneven perception of the test as a basis for resolving church-state issues, in addition to the test's insufficient analytical content.

As soon as the Court announced its definitive Lemon Test derived from a clarification of the criteria of its prior decisions,[69] it began questioning the test's ability to resolve all establishment clause issues. In *Tilton v. Richardson*,[70] decided the same day as *Lemon*, the Court acknowledged that in establishment clause cases, the Lemon Test is incapable of being applied with constitutional precision. The Court then warned against too literal a characterization of the *Lemon* formula as a "test," calling it "guidelines" for determining whether or not a particular case meets the objectives of the religion clauses.[71]

The cases following *Lemon* and *Tilton* developed into a pattern in which the Court's characterization of the test mirrored the degree of its application. When the Court used the Lemon Test to strike down government aid or action, its opinions employed such strong

64. Committee for Public Education v. Nyquist, 413 U.S. 756, 797-98 (1973).

65. 463 U.S. 388, 403-04 n.11 (1983), *reaffirmed in* Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

66. *But see* Choper, *supra* note 9, at 683-85 (arguing that avoiding divisiveness should not be a value secured by the establishment clause, since religious antagonism is a fact of life in a pluralistic governmental system).

67. Walz v. Tax Commission, 397 U.S. 664, 668 (1970) (attributing the inconsistencies of these opinions to "too sweeping utterances on aspects of these [religion] clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.").

68. *See supra* notes 85-120 and accompanying text.

69. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

70. 403 U.S. 672, 677-78 (1971).

71. *Id.* at 678.

terms as, "the essential inquiry,"[72] "the now well-defined three-part test,"[73] and "a convenient, accurate distillation of this Court's efforts [to determine violations of the establishment clause, providing] the proper framework of analysis."[74] However, in cases where the Court employed the test less harshly, the opinions applied weaker characterizations such as "guidelines"[75] or "signposts,"[76] claiming establishment clause jurisprudence was not confined to any one test or mode of analysis.[77]

This variance in judicial attitude forced the Court to doubt the theory on which it had based its rhetoric. As early as *Committee for Public Education and Religious Liberty v. Nyquist*,[78] the Court admitted that, although establishment clause principles were well settled, its application of these principles was unclear. This is reflected by the many concurring and dissenting opinions in the cases. The Court later recognized that its decisions were sacrificing "clarity and predictability for flexibility."[79] In the same opinion, Justice White predicted a continued unevenness of results until the Court could reach agreement on a unified standard of review.[80] The search for a more stable theory continued.

A majority of the Justices on the Supreme Court, including former Chief Justice Burger who authored the test, have expressed dissatisfaction with the *Lemon* analysis. During this decade, three Justices have called for an abandonment of the test,[81] while at least four others have proposed modifications to the test itself or its application.[82] With verbal defenders of the test narrowed to only two members of the Court in 1985,[83] the subsequent reaffirmation of the tripartite Lemon Test surprised many Court observers.[84]

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72. Levitt v. Committee for Public Education, 413 U.S. 472, 481 (1973).

73. Committee for Public Education v. Nyquist, 413 U.S. 756, 772 (1973).

74. Meek v. Pittenger, 421 U.S. 349, 358 (1975).

75. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

76. Hunt v. McNair, 413 U.S. 734, 741 (1973).

77. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

78. 413 U.S. 756, 761 n.5.

79. Committee for Public Education v. Regan, 444 U.S. 646, 662 (1980).

80. *Id.*

81. Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); Committee for Public Education v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); Wolman v. Walter, 433 U.S. 229, 264 (1977) (Stevens, J., concurring and dissenting); Roemer v. Board of Public Works, 426 U.S. 736, 768 (1976) (White, J., concurring).

82. Edwards v. Aguillard, 107 S. Ct. 2573 (1987)(Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring); (Burger, C.J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); Wolman v. Walter, 433 U.S. 229, 259 (1977) (Marshall, J., concurring and dissenting).

83. Wallace v. Jaffree, 472 U.S. 38, 62 (1985) (Powell, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 696 n.2 (1984) (Brennan, J., dissenting).

84. *E.g.*, McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1,2 (1984 Term was marked by a return to the separationist doctrine, which was unexpected in light of the doubt cast on *Lemon* in the two preceding terms).

PAROCHIAL AID: PROBLEMS WITH THE *LEMON* ANALYSIS

Although the Lemon Test is applicable to all establishment clause inquiries,[85] the majority of decisions in this area have involved government attempts to provide financial support to church-related schools or the students attending such schools. Because these cases have provided the main testing ground for the *Lemon* analysis, a brief survey of these opinions illustrates the difficulty the Court has had in applying the three-part test to achieve consistent results.

Prior to the *Lemon* decision, the Court decided only two parochial aid cases on establishment clause grounds.[86] In the first of these, *Everson v. Board of Education*,[87] the Court passed on the constitutionality of a school board resolution which, pursuant to a state statute, authorized reimbursement of public transportation costs to parents of children attending both public and Catholic schools. In the Court's opinion, which inaugurated the Supreme Court's interpretation of the establishment clause, Justice Black took a strict no-aid position, arguing that the framers of the first amendment intended to create a "wall of separation between church and state."[88] Despite this absolutist language, the Court upheld the program as one promoting the general welfare, with only indirect benefits to church-related institutions.[89]

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85. *See supra* note 21.

86. The first constitutional challenge to a state attempt to aid church-related schools involved furnishing free textbooks to children attending both public and private schools in Louisiana. The plaintiffs in that case alleged the program amounted to a taking of private property for private use, in violation of the fourteenth amendment. The Court upheld the program on the basis that the appropriation, which benefited the students and not the schools, was a public purpose within the taxing power of the state. The plaintiffs did not assert an establishment clause challenge. Cochran v. Board of Education, 281 U.S. 370 (1930).

87. 330 U.S. 1 (1947).

88. The famous interpretation of the establishment clause in *Everson* states:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'

330 U.S. 1, 15-16 (1947).

89. The dissenters in this case agreed with the majority on two major points of interpretation: first, the meaning of the establishment clause is found in the views of Jefferson and Madison; and second, the separation of church and state mandated by the first amendment is to be "complete" and "permanent." *See* 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting). The point of departure for the dissenters was the majority's approval of this form of indirect aid.

More than twenty years passed before the Court faced another challenge to a state effort to aid church-related education. In *Board of Education v. Allen*,[90] the Court relied on the result reached in *Everson*, rather than its absolute separation theory, in approving a New York statute which loaned textbooks to all students in grades seven through twelve, including those attending parochial schools. Applying what would become the "purpose" and "effect" prongs of the Lemon Test,[91] the Court upheld the statute on a finding that the express legislative purpose furthered the educational opportunities of the young with no risk of advancing religion. The state had furnished only secular textbooks, with the financial benefit inuring to the parents and children, not to the schools.[92]

The Court completed its general framework for establishment clause analysis in *Lemon v. Kurtzman*,[93] along with the distinctions drawn in *Tilton v. Richardson*,[94] decided the same day. In *Lemon*, the Court addressed the constitutionality of two plans. The first was a Rhode Island program to supplement the salaries of non-public elementary school teachers. The second was a Pennsylvania plan to allow the state to purchase secular educational services from the non-public schools, resulting in reimbursement to the schools of costs for teacher's salaries, textbooks, and instructional materials. In a radical departure from the results in *Everson* and *Allen*, the Court struck down both programs, distinguishing them from prior approved programs which involved secular, neutral and nonideological aid.[95] Although both programs in question included detailed procedures to insure secular educational use of the funds, the Court found the programs constitutionally infirm because they violated the third part of the newly announced test by causing excessive entanglement.[96]

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90. 392 U.S. 236 (1968).

91. The Court applied the "purpose and effect" test articulated in Abington v. Schempp, 374 U.S. 203, 222 (1963).

92. 392 U.S. 236, 248 (1968). The Court refused to accept the proposition that the secular and religious training in the parochial schools was so intertwined that textbooks could not be furnished without advancing religion, since no evidence had been offered to support this contention.

93. 403 U.S. 602 (1971).

94. 403 U.S. 672 (1971).

95. 403 U.S. 602, 616 (1971); *see also* Giannella, *supra* note 6, at 148. "In the *Allen* case in 1967, the Court went over the verge and sanctioned the free loan of textbooks. In *Lemon* the Court sought to scramble back, reaching out for any support it could find on the constitutional landscape. The nearest at hand was the 'excessive entanglement' notion recently enunciated by the *Walz* case and the Court seized it. The Court thus put itself in an even more awkward position.". *Id.*

96. *Lemon*, 403 U.S. 602, 616 (1971) (contrary to *Allen*, *supra* note 92, the Court held that there was sufficient evidence offered at the District Court level to indicate the "substantial religious character" of the church-related schools involved, which prevented assurance that the kind of aid involved would not advance religion, absent "entangling church-state relationships of the kind the Religious Clauses sought to avoid." *Id.*).

In *Tilton*, the Court confronted the constitutionality of Title I of the Higher Education Facilities Act of 1963,[97] which provided Federal grants and loans to all institutions of higher education for construction of academic facilities.[98] Signaling its intent to treat aid to church-related colleges and universities differently from aid to elementary and secondary educational institutions, the plurality found that the statute satisfied the Lemon Test, except for its twenty year statute of limitations on the government's interest in the facilities.[99] The opinion held that the maturity of college students and the lack of religious permeation of the schools in question presented less risk that the aid would either advance religion or entangle the state with the church.[100]

In the four major elementary and secondary school aid cases following *Lemon*[101] the new consensus remained intact, with the Court refusing to approve new forms of aid. The Court struck down five different aid programs[102] for their failure to contain sufficient guarantees that the funds would not be used for religious purposes,[103] while disapproving a sixth form of aid on entanglement grounds.[104] The only pre-college parochial aid to survive

97. 77 Stat. 364 (as amended at 20 U.S.C. §§ 711-21 (1964 and Supp. V)).

98. 403 U.S. 672, 677 (1971) (the act expressly prohibited the use of the facilities for religious purposes).

99. Note that the Court, unlike the decisions which followed involving pre-college parochial aid, refused to accept a "hypothetical profile" of the typical sectarian college or university. *Id.* at 682.

100. *See* Giannella, *supra* note 61, at 516, 584-86 (arguing that government should be allowed more involvement with religion on the higher education level than at the elementary and secondary levels because: "[F]irst, the functions and purposes of the state in higher education are much different from those in lower education; and second, religious perspectives enter into the learning process in a very different manner on each level." Giannella also gives three reasons why government aid should not be denied to a university because of a religiously oriented commitment: support in the form of scholarships and grants promotes the personal choices of the students and enhances the free exercise of religion; it enhances the rights of the students and teachers to full academic freedom; and it encourages diversity in higher education). *Cited in* Tilton v. Richardson, 403 U.S. 672, 686, nn.3-4. *But see* L. PFEFFER, RELIGION, STATE, AND THE BURGER COURT 54 (1984) (taking issue with the Court's reasoning in distinguishing higher education from pre-college aid. First, as to the argument that college students are less vulnerable to religious influences, Pfeffer points out that a substantial number of converts to cults are of college age. "[E]ven if that were not so, the establishment clause forbids government financing of unsuccessful no less than successful efforts to inculcate religious commitments." *Id.* at 54. Second, Pfeffer argues that aid to the non-sectarian aspect of religiously affiliated colleges and universities frees up other monies to be used for religious purposes).

101. Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), and Sloan v. Lemon, 413 U.S. 825 (1973).

102. Meek v. Pittenger, 421 U.S. 349 (1975) (loan of instructional material and equipment); Levitt v. Committee for Public Education, 413 U.S. 472 (1973) (reimbursement for expenses in administering and grading tests and reporting records required by the state); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (provisions for maintenance and repair of facilities, tuition reimbursement and tax relief for parents of children in non-public schools).

103. It should be noted that these forms of aid, which were drafted following the *Lemon* decision, purposefully omitted checks to assure compliance, in order to avoid entanglement problems.

104. *Meek*, 421 U.S. 349, 370-71 (1975) (non-ideological auxiliary services provided in the non-public school facility by state personnel. Although elaborate safeguards were not provided, the Court held that the type of surveillance needed to avoid advancement of religion would lead to excessive entanglement).

the *Lemon* analysis was a textbook loan program, which the Court upheld on the basis of *stare decisis*, as constitutionally indistinguishable from the program approved in *Allen*.[105] According to Justice White, who dissented in each of these cases,[106] the Court's three-part test had created an insoluble paradox; excessive entanglement could only be avoided by running the risk of advancing religion.[107] Furthermore, the Court's decisions clouded the indirect/direct aid distinction for determining permissible programs, which had seemed clear in the prior holdings of *Everson* and *Allen*. During this same period of time, the Court continued its distinction between higher educational institutions and elementary and secondary schools by approving programs which directly benefited religiously affiliated colleges and universities.[108]

The strict approach to pre-college parochial aid collapsed in *Wolman v. Walter*,[109] a case involving six different aid programs. Both the differing votes of the Justices on the programs, and the number of separate opinions recorded, demonstrated the divisions on the Court as to the proper application of the Lemon Test. For the first time since *Lemon*, new forms of aid survived judicial scrutiny,[110] and the Court reaffirmed textbook loans based on *Allen* and *Meek*. The Court, however, refused to approve the loan of instructional materials, but failed to distinguish between the use of such materials in the educational process and the use of textbooks.[111] Likewise, the Court declined to extend the *Everson* bus ride to include field trips.

Three years after *Wolman*, the Court moved even further away from its initial applications of *Lemon* by approving direct subsi-

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105. *Id.* at 359.

106. Meek v. Pittenger, 421 U.S. 349, 381 (1975) (White, J., joining an opinion filed by Rehnquist, J., concurring in part and dissenting in part); Levitt v. Committee for Public Education, 413 U.S. 472, 482 (1973) (White, J., dissenting); Committee for Public Education v. Nyquist, 413 U.S. 756, 813 (1973) (White, J., dissenting); Sloan v. Lemon, 413 U.S. 825 (1973) (White, J., dissenting).

107. Roemer v. Board of Public Works, 425 U.S. 736, 768-69 (1976) (White, J., concurring). *But see*, L. PFEFFER, *supra* note 100, at 29 (arguing that the insoluble paradox could very well have been intended by the framers, who wanted to prevent both tax raised funds from being used to support religious instruction and government intrusion into the religious domain).

108. *Roemer*, 426 U.S. 736 (1976) (non-categorical grants to private colleges, some of which were religiously affiliated), Hunt v. McNair, 413 U.S. 734 (1973) (state issuance of revenue bonds for a Baptist college).

109. 433 U.S. 229 (1977).

110. Programs approved included: speech, hearing and psychological diagnostic services on the non-public school premises, and remedial services off the non-public campuses. *Id.* at 255.

111. *See* Curry, *supra* note 8, at 634 (pointing out that there was no way for the Court to distinguish loans of textbooks from loans of instructional materials and equipment, therefore, it has chosen simply to ignore the inconsistency. This has not only encouraged legislators to test new forms of aid, but also has given credence to the dissenters' arguments).

dies to elementary and secondary parochial schools.[112] Ironically, seven years earlier in *Levitt*, the Court had stricken a similar program.[113] A continued loosening of the *Lemon* standard occurred in *Mueller v. Allen*,[114] where the Court upheld tax deductions for tuition, textbooks, and transportation costs incurred by parents in sending their children to non-public schools. The majority opinion by Justice Rehnquist distinguished the program from a similar one struck down in *Nyquist*[115] on the basis that the deductions were available to all parents, including those with children in public schools, despite the fact that non-public school parents were the principal beneficiaries.[116]

With the decreased significance that the Lemon Test played in two key cases outside the parochial aid spectrum following *Mueller*,[117] the fate of the three-pronged analysis became more uncertain. However, in a surprise move in 1985 reminiscent of its initial post-*Lemon* decisions, the Court struck down three programs involving supplemental and remedial aid, while unequivocally re-affirming *Lemon* as the analytical framework for addressing establishment clause issues.[118]

Although this action seemed to represent nothing more than preserving the status quo, a closer examination of the opinions reveals that the three-part analysis did not emerge unchanged from its embattled fourteen-year history. The most significant difference lies in the Court's reliance on the endorsement approach to the *Lemon* analysis. Justice O'Connor first articulated this approach in her concurring opinion in *Lynch v. Donnelly*,[119] which she expanded upon in a later opinion.[120] The freshness and originality of her analysis has led to quick acceptance by the Court of her language and terminology.[121] While subsequent opinions give hope

112. Committee for Public Education v. Regan, 444 U.S. 646 (1980) (direct aid approved included reimbursements for costs incurred in complying with state mandated testing, scoring, and recording). *Cf.* Crockenburg, *An Argument for the Constitutionality of Direct Aid to Religious Schools*, 13 J. L. & EDUC. 1, 1-2 (1984) (arguing that the Court's denial of direct aid on the basis of political divisiveness is both historically and empirically doubtful).

113. *Levitt*, 413 U.S. 472 (1973).

114. 463 U.S. 388 (1983).

115. 413 U.S. 756 (1973).

116. Despite its weakening effect on the *Lemon* analysis, *Mueller* did revive the direct/indirect distinction which had become blurred in *Nyquist*. 463 U.S. 388, 389 (1983).

117. Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing a city sponsored creché as part of a Christmas display); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding a paid legislative chaplain).

118. Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids v. Ball, 105 S. Ct. 3216 (1985).

119. 465 U.S. 668, 687 (O'Connor, J., concurring).

120. Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

121. Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Witters v. Washington Dept. of Services for the Blind, 106 S. Ct. 748 (1986); Grand Rapids v. Ball, 105 S. Ct. 3216 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985).

that a new consensus is emerging, caution is required. Despite its attractiveness, endorsement as an analytical framework is still elusive, and its ability to offer a viable alternative to the battered Lemon Test depends on its further refinement.

ENDORSEMENT AS AN ANALYTIC FRAMEWORK

Justice O'Connor's endorsement theory is significant both from a conceptual and an analytical standpoint. On the first level, it accomplishes a concise articulation of the protections guaranteed by the establishment clause, a concept that has eluded the Court for years. As an analytical framework, it contains the potential for a more insightful, objective inquiry into establishment clause issues.

Under Justice O'Connor's endorsement approach, the most important function of the establishment clause is to insure that government's relationship with religion does not affect an individual's standing in the political community.[122] To accomplish this, government must take care to avoid both excessive involvement with religious institutions and endorsement or disapproval of religion.[123] Governmental endorsement or disapproval is the more direct of the two types of infringement, which results in treatment of those not in the favored group as less than full members of the political community.[124] The significance of religion to the political process is at the heart of her endorsement concept.

With her clarification of the central function of the establishment clause, Justice O'Connor has remodeled the Lemon Test to improve it as an analytic device.[125] Under her approach, the key issue of whether the government has endorsed or disapproved religion, along with the companion issue of entanglement, can be addressed under her restatement of the "purpose" and "effect"

122. Lynch v. Donnelly, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring).

123. *Id.* According to Justice O'Connor, excessive entanglement threatens the independence of religious institutions, gives religious groups access to governmental power not shared by others and fosters political divisions along religious lines.

124. *Id.*

125. *Id.* at 689.

prongs of the Lemon Test.[126] First, the establishment clause requires a determination of whether the government's actual purpose is to endorse or disapprove religion.[127] In considering this, Justice O'Connor argues that the Court's examination of the legislative intent should be deferential and limited. If the legislature states a secular purpose or disclaims the intent to promote religion, then, as a general rule, that judgment should be honored. Even if the statute fails to contain an express secular purpose in either its text or official history, it should fail the purpose prong only if the Court finds beyond question that the law's rationale is an endorsement of religion or religious belief.[128] Ordinarily, the issue of whether government intended to endorse or disapprove religion should be determined by judging a statute or enactment on its face, by its legislative history, or from its interpretation by a responsible administrative agency.[129]

The second inquiry under Justice O'Connor's revision of the Lemon Test is whether government action conveys a message of endorsement or disapproval. The crucial question under the former "effects" prong was not whether the government action had advanced or inhibited religion, but rather whether government had

126. Initially, entanglement would have remained as a separate rung in Justice O'Connor's revised structure, "properly limited to institutional entanglement," thus omitting political divisiveness as a part of the analytical framework. Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). However, following her dissent in *Aguilar v. Felton*, it is doubtful whether she would keep institutional entanglement as a separate establishment clause inquiry. Although she identified excessive entanglement in *Lynch* as one of the two ways government commits the forbidden practice of making religion relevant to one's standing in the political community, Justice O'Connor's dissent further limits entanglement to a factor "relevant to deciding the effect of a statute which is alleged to violate the establishment clause." In her opinion, "[I]f a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion." 105 S. Ct. 3232, 3248 (O'Connor, J., dissenting).

127. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (according to Justice O'Connor, inquiry into the intent of government action is the subjective component of the message which is being communicated).

128. Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring). *But see* Comment, *Lemon Reconstituted: Justice O'Connor's Proposed Modification of the Lemon Test For Establishment Clause Violations*, 1986 B.Y.U.L. REV. 465, 471 (arguing that under Justice O'Connor's approach, once an improper purpose is determined, the state action will be declared unconstitutional, regardless of whether there are additional secular reasons for the action. Likewise, the Comment contends that under Justice O'Connor's revised purpose prong, tradition may no longer be used as a legitimate secular purpose).

129. In answer to Justice Rehnquist who, in his dissenting opinion, argued that this approach makes the constitutionality of a statute turn on what was or was not put in the legislative history, Justice O'Connor countered with two arguments: first, courts are capable of recognizing "sham" secular purposes; and second, the requirement "reminds government that when it acts, it should do so without endorsing a particular religious belief or practice that all citizens do not share." *Id.* at 2517.

communicated a message of endorsement or disapproval.[130] According to Justice O'Connor, this inquiry is a mixed question of law and fact,[131] which should be determined from the viewpoint of the "objective observer, acquainted with the text, legislative history, and the implementation of the statute."[132] Since entanglement does not survive under her scheme as a separate element of the analysis, "pervasive institutional involvement of Church and State" must be considered as a factor bearing on the issue of whether or not there has been actual endorsement.[133]

Although Justice Stevens' majority opinion in *Wallace v. Jaffree*[134] relied heavily on the endorsement terminology in discussing the secular purpose prong of the Lemon Test,[135] it did little to develop endorsement as an analytical device. However, when the Court expressly re-affirmed the Lemon Test the majority not only embraced the endorsement concept, but built upon Justice O'Connor's foundation.[136] Relying on the first amendment principle of separation of church and state which avoids "too close a proximity,"[137] the Court held that government promotes religion when it allows a close identification of governmental power with religion. According to Justice Brennan, if this identification conveys a message of endorsement or disapproval of religion, "a core purpose of the establishment clause is violated."[138] The Court next stated that a key inquiry under the "effects test" is whether the government's identification with religion creates a "symbolic union of Church and State . . . sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by the non-adherents as a disapproval of their individual religious choices."[139] Justice Brennan concluded that if there is a symbolic union of government with religion in a sectarian under-

130. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (this is the objective component of the message communicated by the government action to the community). *See* Comment, *supra* note 28 at 472-74 (arguing that under Justice O'Connor's revised effects prong, a message of endorsement received by minority religious groups would be sufficient for a constitutional violation, even if it would only indirectly advance the majority religion under the Lemon Test).

131. *Id.* at 693-94.

132. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). *But see* McConnell, *supra* note 83 at 48 (criticizing Justice O'Connor's "objective observer" as an inadequate substitute for a constitutional standard. According to McConnell, this approach only avoids stating what considerations must be made to determine if a statute passes constitutional muster and, if adopted, would give judges the leeway to decide cases the way they think they should be decided).

133. Aguilar v. Felton, 105 S. Ct. 3232, 3248 (1985) (O'Connor, J., dissenting).

134. 472 U.S. 38 (1985).

135. *Id.* at 56, nn. 41-42.

136. Grand Rapids v. Ball, 105 S. Ct. 3216 (1985).

137. Abington v. Schempp, 374 U.S. 203, 259 (1963) (Brennan, J., concurring).

138. Grand Rapids v. Ball, 105 S. Ct. 3216, 3226 (1985).

139. *Id.*

taking, the effect runs afoul of the establishment clause.[140]

While the *Grand Rapids* opinion added substance to the second level of Justice O'Connor's endorsement analysis under her revised Lemon Test, the approach still requires further refinement if it is to protect the full range of establishment clause principles.[141] As Justice O'Connor has correctly recognized, the inquiry into whether government has endorsed or disapproved religion should be the central issue in establishment clause analysis.[142] However, as currently developed, in both her opinions and Justice Brennan's majority opinion in *Grand Rapids*, this query has centered on the perception created by the government action. The question here has become whether government communicated a message of endorsement or created a symbolic union with religion. Although this inquiry is especially adequate in cases involving religious symbols and government efforts to include religious practices in otherwise public settings, it does not protect all establishment clause principles. In particular, the inquiry fails to address the establishment clause prohibition of government financial support, sponsorship or active involvement with religion.[143] Indeed, for this reason, the issue of whether or not government has in fact endorsed or disapproved religion must be broadened to include an equally important consideration. This inquiry should address whether the religious purposes or activities of religious institutions have been promoted, in addition to whether or not a message of endorsement has been communicated. If government has in fact promoted such religious purposes or activities, then it has endorsed religion in a way that runs contrary to the establishment clause.

In refining the endorsement-in-fact inquiry, Justice Brennan's long-standing judicial philosophy on the establishment clause is both compatible with the O'Connor approach and contains some helpful guidelines. The most concise encapsulation of the Brennan position is contained in his famous *Schempp* concurrence and reiterated in many of his subsequent establishment clause opin-

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140. *Id.* at 3227.

141. Lynch v. Donnelly, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring). *Cf.* Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential Of O'Connor's Insight*, 64 N.C.L. REV. 1049 (arguing that Justice O'Connor's endorsement theory is consistent with our constitutional heritage, but its serious implementation will require the rethinking of some firmly entrenched practices).

142. *Id.* at 690.

143. The relationship of establishment clause principles to the Complete Endorsement Analysis is discussed fully in the next section.

ions.[144] According to the Brennan analysis, the establishment clause forbids government involvement with religion that: a) promotes the religious activities of religious institutions; b) uses the arm of the state for essentially religious purposes; or c) accomplishes legitimate governmental objectives with religious means, when secular avenues are available.[145] These first two queries are useful in determining whether government action has promoted the religious purposes or activities of religious institutions. The third query is relevant to the issue of whether government has communicated a message of endorsement.

A second problem with the O'Connor analysis, as it presently stands, is its elimination of entanglement as a separate inquiry or standard.[146] Although she is correct in stating that the political divisiveness aspect of the entanglement prong is too elusive to be part of the analytical framework,[147] the degree of institutional involvement between government and religion is highly relevant to the issue of endorsement and simply cannot be evaluated adequately under the second level of her reformation of the Lemon Test. As Justice O'Connor has correctly recognized, excessive entanglement is one of the major ways in which government violates the establishment clause.[148] Therefore, any proposed method of analysis must be careful to ensure that government avoids this pitfall. The Court recognized this in *Aguilar*, where it re-affirmed the entanglement prong as an essential ingredient in establishment clause analysis.[149]

With the incorporation of these key alterations, the Complete Endorsement Analysis emerges to offer principled results in establishment clause cases. The Analysis can therefore be conveniently developed in answer to three questions:

1) Did the government intend to endorse or disapprove of religion? Consistent with Justice O'Connor's approach, judicial inquiry at this level should be deferential and limited. Despite Justice Rehnquist's concern that this type of inquiry is meaningless,[150] it is important in dealing with feigned secular purposes

144. Abington v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring). *See* Lynch v. Donnelly, 465 U.S. 668, 705 n.11 (1984) (Brennan, J., dissenting), Marsh v. Chambers, 463 U.S. 783, 801 n.11 (1983) (Brennan, J., dissenting), Hunt v. McNair, 413 U.S. 734, 750 (1973) (Brennan, J., dissenting), Lemon v. Kurtzman, 403 U.S. 602, 643 (1971) (Brennan, J., concurring and dissenting), Walz v. Tax Commission, 397 U.S. 664, 680 (1970) (Brennan, J., concurring).

145. Abington v. Schempp, 374 U.S. 203, 294-95 (1963).

146. Aguilar v. Felton, 105 S. Ct. 3232, 3243 (O'Connor, J., dissenting).

147. Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

148. *Id.* at 687-88.

149. Aguilar v. Felton, 105 S. Ct. 3232 (1985).

150. Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

put forth by legislatures.[151] This inquiry also serves to remind government that its actions can not amount to an endorsement of a particular religious belief or practice.[152] This question, moreover, focuses all persons in the decision-making process on this controlling principle.

2) Did the government action in fact endorse or disapprove of religion? As the heart of the establishment clause analysis, the determination of endorsement-in-fact must include both the perception of government's relationship to religion and the degree to which the state is responsible for promoting religion. Regarding this first aspect, government communicates a message of endorsement in one or more of three principal ways: a) when it is closely identified with religion, creating a symbolic union with religion which makes the benefited group feel like insiders, while others are made to feel as outsiders; b) when it attempts to accomplish its purposes by employing religious means, when secular ones are available; and finally, c) when it singles out religion for special treatment or benefits.

The second aspect of endorsement-in-fact deals with the use of government power to promote religion itself. Government action most likely to fall in this category is financial support to religiously affiliated institutions. Here the concern is not with every incidental or indirect benefit that flows from government to a religious body, but rather the extent to which the government aid promotes the religious mission of the benefited institution. In determining if government has promoted that mission, the analysis draws sustenance from the *Lemon* progeny's delineation of what is a direct and substantial advancement of religion. Consequently, government promotes religion under the endorsement-in-fact query if it directly aids a church-related institution that is per-

151. Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (Louisiana statute requiring balanced teaching of creation-science and evolution science in the public schools held to have the preeminent purpose of advancing the religious belief of divine creation of humanity, despite the state's claim that it advanced academic freedom); Wallace v. Jaffree, 472 U.S. 38 (1985) (Alabama statute authorizing a one-minute period in all public schools "for meditation or voluntary prayer" held to have been entirely motivated by religion); Stone v. Graham, 449 U.S. 39, 41 (1980) (Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the state. The statute required the following notation in small print at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the common law of the United States." The Court held that despite this "avowed" secular purpose, the "preeminent" purpose was religious. *Id.*).

152. *See supra* note 129.

meated with religion, or if it funds a specific religious activity in a substantially secular setting.[153]

3) Has government excessively entangled itself with religion? The degree of involvement between government and religion must remain as a separate element of the endorsement analysis. The Court must guard against the kind of ongoing relationship which either threatens the independence of the religious institution involved or gives religion access to government power not shared by others.[154]

ENDORSEMENT AND ESTABLISHMENT CLAUSE PRINCIPLES

The extent to which the Complete Endorsement Analysis will succeed in clarifying the Lemon Test depends on its ability to protect core concerns of the establishment clause as well as its analytical precision. Since *Everson* and the birth of establishment clause interpretation, the Court has struggled to articulate the meaning of the phrase "no law respecting an establishment of religion."[155] Despite this difficulty, six consistent principles emerge which have enjoyed the support of the Court since 1947.[156] As the second Mr. Justice Harlan concluded a year before the Lemon Test was announced, "[I]t is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application."[157] An examination of these six principles reflects the extent to which they are embodied in the Complete Endorsement Analysis.

The first principle, recognized with virtual unanimity on the Court since *Everson*, is that the establishment clause is more than an injunction against adopting a national church.[158] Although *Everson* was a 5-4 decision, the Court reflected its unity on this prin-

153. *See supra* notes 42-44 and accompanying text. But note that the issue of whether religion has been singled out for special treatment or benefit relates more to whether government has communicated a message of endorsement than it does to the specific query of whether or not the religious mission of an institution has been benefited.

154. Aguilar v. Felton, 105 S. Ct. 3232, 3237 (1985).

155. U.S. CONST. amend. I.

156. A restatement of these concerns or values not only serves to test the strength and validity of the Complete Endorsement Analysis, but also clarifies any doubts cast on these principles by a small minority of the justices on the Court. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting) (calling for a reassessment of the entire establishment clause tradition), (White, J., dissenting) (joining Justice Rehnquist in the call for a reassessment), (Burger, C.J., dissenting) (stating that the establishment clause is designed to prevent the "establishing of a state religion." *Id.* at 92.).

157. Walz v. Tax Commission, 397 U.S. 664, 694 (1970) (Harlan, J., separate opinion).

158. *But see infra* note 156.

ciple a year later when Justice Frankfurter concluded that the Court was in total agreement that the establishment clause went much further than merely forbidding an established church.[159] A second parallel principle likewise traces its origins to the *Everson* opinion. This principle forbids government discrimination or favored treatment on religious grounds, as opposed to mere preference of one religion over another.[160] The Court affirmed this principle the following year despite efforts by the defendants to convince the judges to adopt a more limited construction of the clause.[161] The concept has remained constant in interpretation to the present.[162]

Both of these principles are embodied in the Complete Endorsement Analysis. The framework accomplishes this not only by preventing government from considering religion in terms of an individual's standing in the political community, but also by prohibiting symbolic unions of church and state, as well as favored treatment of any or all religions. Principles one and two are likewise guaranteed by the injunction against government's promotion of the religious beliefs or missions of church-related institutions.

Two other principles which have been themes throughout establishment clause opinions involve the concepts of neutrality and separation. Unlike the first two principles, which have remained unchanged, the principles of neutrality and separation have undergone significant doctrinal development.

As to neutrality, the third principle, the Court initially defined it in absolute terms in an attempt to mandate complete government neutrality toward religion.[163] The Court, however, soon recognized that while government must be neutral in matters of religious theory, doctrine and practice, and between religion and

159. McCollum v. Board of Education, 333 U.S. 203, 213 (1948) (Frankfurter, J., separate opinion). Even with continued affirmation of this principle in nearly every establishment clause case, at least two members of the Court have attempted to limit the scope of the establishment clause to a prohibition against a state religion. *See* Aguilar v. Felton, 105 S. Ct. 3232, 3242 (1985) (Burger, C.J., dissenting). *See also* Wallace v. Jaffree, 472 U.S. 38, 100-06, 113 (1985) (Rehnquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 673, 678, 686 (1984) (opinion by Burger, C.J.); Larkin v. Grendel's Den, 459 U.S. 116, 122 (1982) (opinion by Burger, C.J.); Walz v. Tax Commission, 397 U.S. 664, 669 (1970) (opinion by Burger, C.J.).

160. Everson v. Board of Education, 330 U.S. 1, 16 (1947). For the full text of this passage *see supra* note 87.

161. McCollum v. Board of Education, 333 U.S. 203 (1948).

162. The only Justice to attempt to limit the establishment clause to a prohibition against denominational preference was Justice Rehnquist. *See* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

163. Everson v. Board of Education, 330 U.S. 1, 15-16 (1947); Zorach v. Clauson, 342 U.S. 306, 319 (1952) (Black, J., dissenting). *See* Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 94-98 (1986) (claiming that Justice Black put the neutrality principle on a collision course by subjecting it to two conflicting requirements: government may not aid religion; yet government may not exclude anyone from the general benefits of public welfare legislation because of their religion).

non-religion,[164] it must accommodate competing free exercise values. Consequently, constitutional neutrality is not a "straight line."[165] On the eve of the announcement of the Lemon Test, the Court characterized this first amendment value as "benevolent neutrality."[166] This term continues to epitomize the current principle.[167] Consistent with this interpretation, the Complete Endorsement Analysis does not require absolute neutrality by the state toward religion. Instead, it allows room for government to acknowledge religion to the extent it stops short of actually endorsing it.[168] This accommodation is of particular importance when government acts to allow individuals the opportunity to practice their religion.[169] A major strength of the Endorsement Analysis is its ability to deal in a principled way with government acknowledgements of religion and accommodations of religious beliefs. In contrast, the original *Lemon* analysis failed to adequately address this issue, forc-

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164. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *But see* Gorman, *A Catholic View: Toward a More Perfect Union Regarding the American Civil Liberty of Religion* in THE WALL BETWEEN CHURCH AND STATE 41, 46-52 (D. Oaks ed., 1963) (arguing that "irreligion" should not be within the purview of the religious guarantees, but rather should look to the non-religious guarantees in the Bill of Rights for protection. If this were the case, then there would be no inhibition toward government actions aimed at securing religious liberty, and actions taken to avoid abridgement of free exercise by the state would not be considered aiding or establishing religion).

165. Walz v. Tax Commission, 397 U.S. 664, 669 (1970). *See also* Giannella, *supra* note 61, at 514-15 (arguing that with the active role the state has undertaken in allocating resources and structuring the social order, the denial of benefits to religious groups is not only unnecessary under the establishment clause, but may actually frustrate its purposes).

166. Walz v. Tax Commission, 397 U.S. 664, 669 (1970).

167. Despite the centrality of this principle to the establishment clause, it too has been criticized. *See* Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring)(claiming that the neutrality principle has long aggravated the conflict between the establishment and free exercise clauses). *See also* (Rehnquist, J., dissenting) *Id.* at 113. *But see* Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 378-82 (1986) (arguing that the neutrality principle was significantly damaged by the *Lynch* case, but rehabilitated in *Estate of Thorton, Grand Rapids*, and *Jaffree*, primarily by repudiating the *Lynch* plurality notion that the establishment clause only forbids the creation of a state religion or church).

168. Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring).

169. With regard to the clash between the establishment and free exercise clauses, Justice O'Connor sees the solution as lying in "identifying workable limits to the government's license to promote the free exercise of religion," not in "neutrality." Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring). Accordingly, she would modify her establishment clause test in cases where government acts to lift a government-imposed burden, and individual resentments of the exemption given the religious observer "would be entitled to little weight if the Free Exercise Clause strongly supports the exemption." *Id.; accord* Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PITT. L. REV. 1175, 1178-79 (1983) (arguing that a free exercise issue must be addressed first, since government efforts to remedy a burden it has placed on free exercise cannot be deemed to have the purpose or primary effect of advancing religion). *But see* McConnell, *supra* note 83, 32-34 (criticizing Justice O'Connor's limitation of corrections for free exercise violations to government imposed burdens. According to McConnell, there is a permissible class of government actions toward religion between accommodations required by free exercise and benefits to religion prohibited by the establishment clause, therefore religious liberty is not enhanced by confining accommodation to the minimum compelled by the Constitution).

ing the Court to ignore its analytical scheme in one acknowledgement case[170] and apply it weakly in another.[171]

The fourth principle of separation is a value akin to neutrality, and has likewise undergone a similar metamorphosis. Adopting Thomas Jefferson's famous "wall" metaphor used in a letter to the Danbury Baptist Association, the Court in *Everson* also described the mandated separation of church and state in absolute terms.[172] On this point, the entire Court agreed as to the degree of separation required, with the majority describing the "wall of separation" as "high and impregnable"[173] while the dissent called for "complete and permanent" separation.[174]

The absolutist approach has, however, never proved to be workable. In fact, the Court admitted rather quickly that the constitutionally mandated principle of separation between government and the church was a question of degree.[175] By the time the Burger Court undertook its review of the parochial aid cases of the 1970s, the Court affirmed that the separation principle did not require total separation, and conceded that the wall metaphor had degenerated to a "blurred, indistinct and variable barrier."[176] The separation principle which emerges from the decisions, though by no means absolute, is best characterized as requiring the avoidance of "too close a proximity"[177] between religion and government so

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170. Marsh v. Chambers, 463 U.S. 783 (1983).

171. Lynch v. Donnelly, 465 U.S. 668 (1984). Although Justice O'Connor first espoused her Endorsement Theory in her concurring opinion in *Lynch*, she applied it with less than enthusiastic vigor to the facts of that case by concluding that the town-sponsored creche was an acknowledgement rather than an endorsement of religion. She ignored what is at the very heart of the endorsement concept – the relevance of religion to one's standing in the political community. In emphasizing the connection of the creche to the historical origins of a national holiday, Justice O'Connor failed to discuss the communicative impact of the creche or the symbolic union between one set of religious beliefs and the state. *See* Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality and the Approach of Justice O'Connor*, 62 NOTRE DAME L.REV. 190-91 (arguing that Justice O'Connor's great degree of tolerance for government sponsorship of religious symbols weakens her concept of what is endorsement).

172. 330 U.S. 1, 15-16 (1947).

173. *Id.* at 18. For criticisms of the Court's use of the "wall" metaphor, *see* Oaks, *Introduction* in THE WALL BETWEEN CHURCH AND STATE 1, 3 (D. Oaks ed., 1963); Hutchins, *The Future of the Wall* in THE WALL BETWEEN CHURCH AND STATE 17, 19 (D. Oaks ed., 1963). *But see* Fey, *A Protestant View: An Argument for Separation* in THE WALL BETWEEN CHURCH AND STATE 26 (D. Oaks ed., 1963) (arguing that the "wall" as Jefferson used it "means a distinction, a limitation, a definition of fields of competence and authority," therefore "clarifies rather than confuses thoughts." *Id.* at 37-38.).

174. Everson v. Board of Education, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting).

175. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

176. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

177. Abington v. Schempp, 374 U.S. 203, 259 (1963) (Brennan, J., concurring).

as to prevent intrusion of one into the precinct of the other.[178] It is this ideal which necessitates the retention of and is adequately safeguarded by the entanglement inquiry under the Complete Endorsement Analysis.

A fifth principle which has run throughout establishment clause jurisprudence is that government should avoid relationships with religion which lead to financial support, sponsorship, and active involvement in religious activity.[179] This principle is left unprotected under Justice O'Connor's revised Lemon Test, which both limits the issue of actual endorsement to the perception created by government action and eliminates entanglement as a separate inquiry.[180] The Complete Endorsement Analysis, which includes the promotion of religious purposes or activities within its definition of endorsement, addresses the concern of financial support and sponsorship. Additionally, the framework's retention of the entanglement inquiry guards against the active involvement of the state in church affairs.

Finally, as a sixth principle, the avoidance of political divisiveness over religion which tends to strain a political system in an unhealthy way[181] has been recognized as a central concern behind the establishment clause.[182] Its status in the hierarchy of first amendment values led the Court to include political divisiveness as a separate consideration under the entanglement prong of the Lemon Test. As previously discussed, the Court soon began questioning its ability to use the principle as part of the analytical framework. First, it conceded that political divisiveness, standing alone, was insufficient as a basis for finding an establishment clause violation.[183] Second, it limited its application to cases involving direct subsidies to parochial schools.[184]

These restrictions do not lessen the significance of political divisiveness as an establishment clause value, but rather point to its

178. Aguilar v. Felton, 105 S. Ct. 3232, 3237 (1985). *But see* Beschle, *supra* note 171 at 151-52 (arguing that liberal neutrality, rather than separation, is more realistic and fruitful for establishment clause analysis. Beschle defines liberal neutrality as government avoidance of influence over individual choices on religion through policies which give incentives to choose one value system over another. He considers Justice O'Connor's endorsement theory as the best example of neutrality).

179. Grand Rapids v. Ball, 105 S. Ct. 3216, 3221 (1985); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

180. *See supra* text accompanying notes 143-45.

181. Walz v. Tax Commission, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

182. Mueller v. Allen, 463 U.S. 388, 399-400 (1983).

183. Committee for Public Education v. Nyquist, 413 U.S. 756, 797-98 (1973).

184. Mueller v. Allen, 463 U.S. 388, 403-04 n.11 (1983).

misplaced position in the *Lemon* analytical framework.[185] Because the potential for divisiveness is at best speculative, the interest of protecting it as a constitutional value is best served by focusing on the cause of the divisiveness, rather than on the divisiveness itself.[186] Endorsement, by its very nature, addresses the effects of government actions toward religion as they affect an individual's standing in the political community.[187] The Complete Endorsement Analysis clearly seeks to avoid the kind of government activity which divides people along religious lines, namely government endorsement or disapproval of religion.

APPLICATION OF THE COMPLETE ENDORSEMENT ANALYSIS

Application of the Complete Endorsement Analysis to three broad areas which have persistently troubled the Court serves to illustrate its primacy over the simple Endorsement Analysis of Justice O'Connor. The areas of difficulty have been parochial aid, religion in the public schools, and the religious symbols cases. A brief comment on each of these demonstrates the effectiveness of endorsement in resolving a wide range of establishment clause issues.

As the previous discussion of the parochial aid cases indicates,[188] any attempt to apply a new or altered analysis does not begin with a clean slate. However, the Complete Endorsement Analysis is particularly appropriate for the unification of this line of cases for three reasons. First, the Analysis clarifies and galvanizes important prior distinctions made by the Court, but left as yet unexplained.[189] Second, the new framework, which is based on articulated principles, provides a clearer distinction between permissible and impermissible parochial aid. Finally, the Court's

185. *See* Giannella, *supra* note 6 at 167 (pointing out that political divisiveness offers no practical standards for distinguishing between healthy and constitutionally permissible controversy and political fragmentation and divisiveness which runs afoul of the establishment clause. As a result, Giannella argues that political divisiveness must be tied to another principle or concept if it is to comprise a workable judicial standard).

186. Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

187. *Id.* at 687.

188. *See supra* notes 85-121 and accompanying text.

189. For example, the distinction between whether or not remedial educational services are provided by the state on or off of the campus of the parochial school is difficult to explain under the Lemon Test, but comes into focus when the communicative aspects of endorsement are considered. *See* Grand Rapids v. Ball, 105 S. Ct. 3216 (1985); Aguilar v. Felton, 105 S. Ct. 3232 (1985).

recognition of the Complete Endorsement Analysis will result in minimal alterations of prior holdings.[190]

Consistent with *Lemon* precedent, most, if not all, aid programs will have little difficulty satisfying the inquiry of intent to endorse or disapprove religion, as was true of the "purpose" prong of the Lemon Test.[191] Clearly, the operative inquiries will be those of endorsement-in-fact and excessive entanglement. Under the first of these, endorsement-in-fact, the issue of whether government has promoted the religious mission of an institution relies heavily on the *Lemon* decisions dealing with the "primary effect" prong of the old analysis. As already noted, this query is important in the parochial school area, particularly in guarding against governmental financial support, sponsorship or active involvement with religion, which represents a key establishment clause concern.[192] Additionally, the new inquiry into whether government has conveyed a message of endorsement is of particular significance in evaluating the constitutionality of parochial aid, since permissible government action involves the perception created by its relationship with religion, as well as the degree to which money flows from the state to religion. Furthermore, this lends an attractive clarification for some of the rather tenuous lines drawn by the Court.[193] As previously noted, prior judicial distinctions simply cannot be explained under the "effect" prong of the Lemon Test,[194] but they very quickly come into focus under the Complete Endorsement Analysis. Finally, the entanglement inquiry remains a valuable tool in measuring the extent of permissible aid to religiously affiliated schools. Although it has the effect of eliminat-

190. An application of the Complete Endorsement Analysis, while clarifying prior lines drawn between permissible and impermissible aid programs, would only require re-evaluation in two areas. First, the loaning of textbooks to children attending non-public schools. Board of Education v. Allen, 392 U.S. 236 (1968). Second, tuition reimbursement and tax relief to parents of children attending non-public schools should also be re-evaluated. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). Since textbooks, secular or otherwise, go to the heart of the educational process, any attempt to ensure that their use will not promote the religious missions of schools which are permeated with religion are by definition inexpedient. Under the Complete Endorsement Analysis, the promotion of the religious mission or activities of religious institutions by government is clearly an endorsement of religion. Tax relief and tuition reimbursements to parents of children attending public schools should not have to turn on whether the same benefit is provided to all school children, so long as religious schools are not singled out for special benefit. Since this type of aid would be provided to children attending both religious and non-religious schools, government would not run the risk of communicating a message of endorsement, and likewise would only indirectly promote the religious missions of the parochial schools whose students are the recipients of such benefits.

191. *See supra* notes 150-52 and accompanying text.

192. *See supra* notes 141-45 and accompanying text.

193. *See supra* note 189.

194. *See* Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 CALIF. L. REV. 5, 7 (1987) (pointing out that the Court's distinction between on-campus and off-campus aid, while presenting an interesting geographical distinction, is difficult to justify as having constitutional significance).

ing most forms of direct aid to elementary and secondary non-public schools, it remains the crucial factor in assessing the validity of such aid to colleges and universities.

The Complete Endorsement Analysis likewise provides a better framework for addressing the proper role of religion in public schools. While the "purposes" and "effects" prongs of the original Lemon Test provided an adequate basis for addressing the establishment clause concerns related to religious exercises and observances in the schools,[195] they simply were unequipped to deal with the issues of accommodation of religious practices and acknowledgment of religion in the public school setting. In this context, the inquiry into whether government has in fact endorsed religion is crucial to the resolution of this establishment clause issue, and provides the Court with sufficient leeway to protect free exercise concerns without undue conflict between the two religion clauses of the first amendment.

Finally, the communicative aspects of the endorsement-in-fact prong of the Complete Endorsement Analysis provide a much more insightful establishment clause inquiry in the religious symbol cases. Under *Lemon* and its progeny the "primary effect" inquiry proved difficult to apply outside the area of parochial aid; particularly so in the symbolism cases.[196] Therefore, the communicative dimensions of the Endorsement Analysis offer welcomed guidelines for determining whether or not there is an establishment clause violation when government employs religious symbols.

CONCLUSION

With the assurance that settled establishment clause values are adequately safeguarded by the Complete Endorsement Analysis, the final dimension of the approach's sufficiency as a viable alternative to *Lemon* is its ability to produce principled results. It succeeds for three reasons.

First, Endorsement better captures the essence of establishment clause design than prior articulations put forth by members of the Court and other legal scholars. Its sweep, therefore, is sufficiently broad to protect the major values upon which the Court has been able to agree.

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195. *E.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Abington v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

196. *E.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984).

Second, in its completed form, the Endorsement Analysis is able to address the full spectrum of possible establishment clause issues, not only the narrow category of concerns out of which the analysis has developed. With the logical expansion of endorsement-in-fact to include direct promotions of religious purposes as well as perceptions of endorsement, the framework provides the necessary analysis for both parochial aid issues and matters related to the infusion of religion into traditionally public and secular settings.

Finally, the Complete Endorsement Analysis offers hope of more rational and consistent results, in addition to some measure of predictability for legislators charged with the responsibility of drafting statutes that comport with the Constitution. The degree to which Endorsement is able to achieve consistency and predictability is dependent on the extent to which the Court is willing to rely on the analysis. The specific articulation of what is endorsement-in-fact, however, leaves less room for manipulation of the standard than existed under the Lemon Test. Consequently, this approach achieves cohesion without creating unrealistic rigidity.